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[1] S.B. CRIMINAL MISC. [SUSPN. OF SENTENCE]
APPLICATION NO. 1055/2006
IN
S.B. CRIMINAL APPEAL NO.841/2006.
[RAM KISHORE KHANGAR VS. STATE]

[2] S.B. CRIMINAL MISC. [SUSPN. OF SENTENCE]
APPLICATION NO.1056/2006.
IN
S.B. CRIMINAL APPEAL NO. 842/2006.
[RAM KISHORE KHANGAR VS. STATE]

DATED : 09.05.2007

HON'BLE MR. CHATRA RAM JAT, J.

Mr.S.P.Sharma for the appellant
Mr.J.P.S.Choudhary, P.P.

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By the instant applications No.1055/2006 and 1056/2006 filed under Section 389(1) Cr.P.C. the appellant seeks suspension of conviction recorded by the learned Special Judge, Prevention of Corruption Cases, Jodhpur, therefore, both the applications are heard together and decided by this common order.

According to the prosecution story, the brief facts of the case are that the accused appellant Ram Kishore at the time of incident was working as District Education Officer, Jaisalmer and on 31.11.1997 an First Information Report was lodged at Bureau, Jaipur that a conspiracy was

formed by present appellant Ram Kishore with co-accused Trilok Chand in which accused appellant Ram Kishore gave appointment to co-accused Trilok Chand for the post of Laboratory Assistant, Mayajlar, District Jaisalmer. In criminal case No.09/2001 accused appellant appointed co-accused Murari Lal for the post of Librarian [Grade III] without adopting proper procedure and having no vacancy for that post and the same was investigated and charged by Secretary, Raj. State Library Commission, Jaipur.

After investigation, challan was filed and prosecution examination as many as 11 prosecution witnesses in Criminal Case No.15/1999 and 18 prosecution witnesses in Criminal Case No.09/2001. On appreciation of evidence produced before the learned trial court, the learned trial court came to the conclusion that prosecution has proved the case against the appellant and held him guilty for the offence under Section 13 [1] [d] [ii] of the P.C.Act, 1988 and 120-B IPC and under Section 13 [1] [d] [ii] of the P.C. Act,1988 and under Sections 120-B, 460 and420/511 IPC respectively and convicted and sentenced as indicated in the judgment of the learned trial court.

I have heard learned counsel for the appellant and

learned Public Prosecutor for the State. Perused the judgment and order dated 19.09.2006 as also the record of the trial court.

Learned counsel appearing for the appellant submits that under Section 389 [1] Cr.P.C. the power is conferred on the Appellate Court to stay the operation of the order of the conviction but it have been cautioned and clarified that such power should be exercised only in exceptional circumstances where failure to stay the conviction would lead injustice or irreversible circumstances and instance case is such one.

Learned counsel for the appellant further states that the appellant was retired on 30.06.1996 and now his age is above 70 years and falls in the category of senior citizen and there having no chance of occupying the post again and there is no allegation of getting any monetary benefits. He further urged that FIR was lodged after his retirement i.e. on 30.01.1997 and the alleged offences does not involved moral attitude. Learned counsel further submits that the pension which was drawn upto December, 2006 has been now stayed w.e.f. January, 2007 because of the conviction and thus the appellant is deprived of the provisional pension

and it is difficult for his survival and the hearing of appeal will take a long time so appellant's case is an exceptional and having rare circumstances where non-grant of stay would lead to injustice and irreversible consequences so the conviction should be suspended or stayed.

Learned counsel for the appellant in his written submissions has pointed out the following categories for the point of suspension and execution of conviction under Section 389 [1] Cr.P.C. during the pendency of the criminal appeal which are as under:-

> "First Category of Case:-
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> [1] Case of conviction under only IPC for ordinary offences.
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> [2] Cases of conviction under IPC in respect of grave offences.
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> [3] Cases of conviction under only PC Act.
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> [4] Cases of conviction under PC and also under IPC.
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> Second Category of case:-
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> [1] Cases of conviction in respect of public servants for offences not involving moral turpitude.

[2] Cases of conviction in respect of Pubic Servants for offences involving Moral turpitude.

[3] Cases of conviction in respect of other persons other than Public Servants.

[4] Cases of conviction in respect of retired Government Servants not involving moral turpitude.

Third Category in case :-

[1] Cases of conviction under PC Act in the matters of Trap cases of receiving bribes, by Public Servants.

[2] Cases of conviction under PC Act in the matters of disproportionate asset property cases of Public Servants.

[3] Cases of conviction under PC Act, in the matters of irregularities committed by Government Servant, causing losses to Government.

[4] Cases of conviction under PC Act, in the matters of alleged other irregularities committed by Government Servant, while in discharge of duties, but no causing losses to Government.

[5] Cases of conviction under PC Act, in the matters of irregularities committed by Government Servant, not amounting to moral turpitude.

Fourth Category of case:-

[1] Case of conviction under PC Act/IPC, in respect of very old persons, requiring sympathetic consideration, to avoid damages

to their survival.

[2] Cases of conviction in respect of persons, causing disqualification, for future prospects, causing damages to their career, resulting irreparable injuries."

Learned counsel for the appellant has relied upon the latest judgment of Hon'ble Supreme Court in the matter of Navjot Singh Sidhu Vs. State of Punjab & Anr. 2007 AIR SCW 787 in which Hon'ble Apex Court in Para No.3 of the judgment has observed as under:-

> "Before proceeding further it may be seen whether there is any provision which may enable the Court to suspend the order of conviction as normally what is suspended is the execution of the sentence, Sub-section (1) of S.389 says that pending any appeal by a convicted person, the appellate Court may, for reasons to be recorded by it in writing, order that the execution of the sentence or order appealed against be suspended and, also, if he is in confinement, that he be released on bail, on his own bond. This Sub-section confers power not only to suspend the execution of sentence and to grant bail but also to suspend the operation of the order appealed against which means the order of conviction. This question has been examined in considerable detail by a Three Judge Bench of this Court in Rama Narang Vs. Ramesh Narang & Ors [1995] 2 SCC 513 and Ahmadi C.J., speaking for the Court, held as under:- [para 19 of the reports].
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> "That takes us to the question whether the scope of

Section 389 [1] of the Code extends to conferring power on the Appellate Court to stay the operation of the order of conviction. As stated earlier, if the orde of conviction is to result in some disqualification of the type mentioned in Section 267 o the Companies Act, we see o reason why we should give a narrow meaning to Section 389 [1] of the Code to debar the Court from granting an order to that effect in a fit case. The appeal under Section 374 is essentially against the order of conviction because the order of sentence is merely consequential thereto: albeit even the order of sentence can be independently challenged if it is harsh and disproportionate to the established guilt. Therefore, when an appeal is preferred under Section 374 of the Code the appeal is against both the conviction and sentence and therefore, we see no reason to place a narrow interpretation on Section 389 [1] of the Code not to extend it to an order of conviction. In a fit case if the High Court feels satisfied that the order of conviction needs to be suspended or stayed so that the convicted person does not suffer from a certain disqualification provided for in any other statute, it may exercise the power because otherwise the damage done cannot be undone; the disqualification incurred by Section 267 of the Companies Act and given effect to cannot be undone at a subsequent date if the conviction is set aside by the appellate court. But while granting a stay or suspension of the order of conviction the court must examine the pros and cons and if it feels satisfied that a case is made out for

> grant of such an order, it may do so and in so doing it may, if it considers it appropriate, impose such conditions as are considered appropriate to protect the interest of the shareholders and the business of the Company."

The aforesaid view has recently been reiterated and followed by another three Judge Bench in Ravikant S.Patil Vs. Sarvabhouma S. Bagali, 2006 [1] JT [SC] 578. after referring to the decisions on the issue viz, State of Tamil Nadu Vs. A.Jaganathan [1996] 5 SCC 329; . K.C.Sareen Vs. CBI, Chandigarh [2001] 6 SCC 584; B.R.Kapur Vs. State of T.N. And Anr. [2001] 7 SCC 231 and State of Maharashtra Vs. Gajanan & Anr. [2003] 12 SCC 432, this Court concluded [para 12.5 of the report].

> "All these decisions, while recognising the power to stay conviction, have cautioned and clarified that such power should be exercised only in exceptional circumstances where failure to stay the conviction, would lead to injustice and irreversible consequences."

The Court also observed:-

> "11. It deserves to be clarified that an order granting stay of conviction is not the rule but it is an exception to be resorted to in rare cases depending upon the facts of a case. Where the execution of the sentence is stayed, the conviction continuous to operate. But where the conviction is stayed, the effect is that the conviction will not be operative from the date of stay. An order of stay, of course, does

> not render the conviction non-existent, but only non-operative ....."

> The legal position is, therefore, clear that an appellate Court can suspend or grant stay of order of conviction. But the person seeking stay of conviction should specifically draw the attention of the appellate Court to the consequences that may arise if the conviction is not stayed. Unless the attention of the Court is drawn to the specific consequences that would follow on account of the conviction, the person convicted cannot obtain an order of stay of conviction. Further, grant of stay of conviction can be resorted to in rare cases depending upon the special facts of the case."

The Hon'ble Apex Court further observed in Para 15 which is as under:-

> Lastly, Shri Dwivedi has submitted that in view of the law laid down in State of Tamil Nadu Vs. A.Jaganathan, (1996) 5 SCC 329 and K.C.Sareen Vs. C.B.I., Chandigarh, (2001) 6 SCC 584 the order of conviction passed against the appellant should not be suspended. The cases cited have no application to the facts of the present case as both of them related to conviction on charges of corruption and in that context it was observed that **when conviction is on a corruption charge, it would be a sublime public policy that the convicted person is kept under disability of the conviction instead of keeping the sentence of the imprisonment in abeyance till the disposal of the appeal. In such cases, it is obvious that it would be highly improper to suspend the order of conviction of a public servant**

which would enable him to occupy the same office which he misused. This is not the case here."

Learned counsel for the appellant further urged that conviction on corruption charges as a public policy convicted person is kept under disability of the conviction instead of keeping the sentence of imprisonment in abeyance till disposal of the appeal so that such convicted public servant could not occupy the same offence which he/she misused. But this is not a case because of the retirement and so the benefit of suspension of conviction should be granted. He further states that his case should be considered as his case falls in the above categories, therefore, conviction should be suspended.

Learned P.P. Vehemently opposed that this is not a case for the suspension of conviction because this is not an exceptional having and rare circumstances where non-grant of stay lead to injustice and irreversible consequences and only because of retirement this Court cannot pass order of suspension mechanically because the Hon'ble Apex Court in the matter of Dy. Director of Collegiate Education [Admn.] Vs. S. Nagoor Meera reported in AIR 1995 SCC 1364 held that the Government should not wait for the decision of

appeal or the revision in the case of convicted person and on acquittal of such public servant would be reinstated having all benefits would have been in the service. On the point of human rights, personal hardship etc. a recourse of early hearing on the administrative side may be taken. On making reliance by learned P.P. On the decision in Dy.Director of Collegiate Education [Admn.] [Supra] further contended that regarding recovery of pension and retiral benefits is concerned, in the eventuality of conviction confirmed and upheld by the Appellate Court then recovery would be a great difficulty so this is not a case for suspension of conviction so the application should be dismissed. He further submits that Hon'ble Apex Court in Dy.Director of Collegiate Education [Admn.] [Supra] has held as under:-

> "The Tribunal seems to be of the opinion that until the appeal against the conviction is disposed of, under clause (a) of the second proviso to Article 311 (2) is not permissible. We see no basis or justification for the said view. The more appropriate course in all such cases is to take action under clause (a) of the second proviso to Article 311 (2) once a government servant is convicted of a criminal charge and not to wait for the appeal or revision, as the case may be. If, however, the government servant accused is acquitted on appeal or other proceeding, the order can always be revised and if the government servant is reinstated, he will be entitled to all the benefits to which he would have been

entitled to had he continued in service."

It is a well settled principle that the Court should exercise its discretion judiciously and judicially. When anything is left to any person, Judge or Magistrate to be done according to his discretion, the law intends it must be done with sound discretion and according to law. Discretion is to discern between right and wrong; and, therefore, whoever hath power to act at discretion, is bound by the rule of reason and law.

After going through the submissions made by the learned counsel for the appellant and looking to all the facts and circumstances of the case and legal position it is quite clear that Appellate Court can entertain an application under Section 389 [1] Cr.P.C. and suspend the conviction but this should not be exercised mechanically and the discretion should be exercised judiciary or judiciously in an exceptional and rare circumstances where non-grant of stay would lead to injustice which cannot be compensated and in present case, the only ground is of old age and stoppage of provisional pension which cannot be a ground and looking to the finding of the Hon'ble Apex Court in Dy. Director of Collegiate Education [Admn.] [Supra] otherwise if every

such trifling matters involving slide disadvantage to the convicted person were to be taken into consideration. Then, however, conviction would have to be suspended in every case of pending appeal or revision.

In my opinion, in the circumstances, the instant case is not a case in which suspension of conviction is to be stayed and in this view of the matter I do not find it to be a fit case to suspend the conviction awarded to the appellant.

However, a request may be made for early hearing on account of humanitarian ground, financial hardship, serious ailment and old age etc. to the court on administrative side.

Accordingly, the application seeking suspension of conviction and sentence is hereby dismissed. The appellant, if so advised or desired, may move for early hearing of the appeal.

[CHATRA RAM JAT],J.

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